Chapter 5: Are there other options? Part 2

Updated: 15 April 2025

Content

Important: The options covered in this Chapter are formal arrangements under the Bankruptcy Act. An informal agreement with creditors is almost always better than a formal option under the Bankruptcy Act where it is possible. Financial counsellors can sometimes achieve fantastic results for clients with advocacy skills and perseverance.

Part 2: Debt agreements

Summary

This section is for financial counsellors wanting to know more about *Informal Debt Agreements and Part IX Debt Agreements ('Debt Agreements')* so they can better advise clients about this option. If your client is already in a Debt Agreement and is having problems or has complaints, you should refer to **Chapter 11**. **Chapter 11** also deals with the issue of fees that may be payable where someone has either changed their mind about entering a Debt Agreement or their proposal has not been accepted. If you have a client who has lodged a Debt Agreement Proposal and is having second thoughts, urgent action may be required to stop the process – see **Chapter 11**.

A Debt Agreement is a formal alternative to bankruptcy for low-income debtors. They allow debtors to reach a compromise on their debts with their creditors without the debtors having to go through the formal processes of bankruptcy. The consequences of Debt Agreements are serious and are similar to bankruptcy itself, especially in circumstances where the debtor does not have any real estate (such as an apartment, home or land) that would be taken by the Trustee in bankruptcy. Unlike bankruptcy, your client's property is not affected. A person in a Debt Agreement can also acquire property during the agreement without it being taken (by the Trustee) for the benefit of creditors. In a Debt Agreement there is no trustee, only a Debt Agreement Administrator.

Many clients are put into Debt Agreements in circumstances where they would have been financially better off bankrupt. Debt Agreements may last longer than bankruptcy and often do. Further, many clients default on their Debt Agreements and ultimately end up bankrupt anyway.

The debtor will pay an upfront fee for the preparation of a Debt Agreement Proposal. This will usually not be refunded even if the proposal is rejected.

There are very limited circumstances in which a Debt Agreement may be the best option for your client. The following circumstances typically indicate that a Debt Agreement is **NOT** suitable for your client:

- Their income is less than the bankruptcy threshold for income contributions; and
- They do not own any property that would be divisible in bankruptcy (see **Chapter 6 Part 3** for an explanation of divisible property); or
- They have only one debt, or very few debts.

Clients who wish to remain company directors (or engage in another occupation which is permitted under a Debt Agreement but not bankruptcy), are a special case but need to carefully consider the ramifications and risks involved in pursuing a Debt Agreement.

If your client wants to make a contribution to their debts but can't afford to pay in full, this may be able to be achieved through an informal arrangement. Further, there is nothing to stop clients making voluntary payments to creditors during bankruptcy provided they are otherwise complying with their obligations to the Trustee.

Introduction

As mentioned, a Part IX Debt Agreement is a formal alternative to bankruptcy under the Bankruptcy Act introduced in 1996. Debt Agreements were substantially refined in September 2019, which is discussed in detail below. Amendments to the regulation of Debt Agreements came in response to the increasing use of debt agreements and evidence of consumer exploitation by the debt agreement industry. Please see the previous version of this toolkit for Debt Agreements entered into prior to 27 September 2019. Although it is considered an alternative to bankruptcy, many of the consequences are the same, so clients considering a Debt Agreement should proceed with extreme care. The potential advantages and risks involved are complex and difficult for most debtors to weigh up effectively.

What is an Informal Debt Agreement?

An **informal debt agreement** is an agreement between an individual and their creditors, similar to a Part IX debt agreement, but it is not a form of bankruptcy and is not regulated in legislation. Increasingly, this type of informal arrangement is **organised and administered by debt administration businesses**, for a fee. Fees can be substantial.

For some clients they may have an informal debt agreement set up already and they may come to you after it has failed and will be looking at their options going forward, including about any fees they may previously been charged to set up the informal agreement.

If your client has previously entered into an informal agreement, you can request copies of any agreements from the entity they used and see **Chapter 11 Part 2** of this toolkit if there are any issues with the fees being charged.

What is a Debt Agreement?

As stated above, a Debt Agreement is a formal alternative to bankruptcy under the *Bankruptcy Act 1966* (Cth)*.* Under a Debt Agreement, the debtor most commonly agrees to pay a proportion of their debts in instalments in return for which the creditor agrees to forego enforcement action. If, and only if, the Debt Agreement is paid out in full, the creditors forego the remainder of the debt. Other arrangements such as payment of a lump sum or payment of a lump sum from the proceeds of the sale of identified property (for example, the sale of the client's car or caravan), are also possible but less common.

Usually, the debtor will pay an upfront fee for the preparation and presentation of the Debt Agreement in addition to an ongoing percentage of payments made for the administration of the agreement. There is also a lodgement fee payable to AFSA which was $200 as at April 2025, with exemptions applying if an eligible disaster recovery payment was made in the 12 months before. Check the AFSA website for current fees. As the debts are frozen at the point the agreement is entered on the National Personal Insolvency Index (NPII) further interest is no longer payable, however, the provable debt that is frozen will include interest charged to date.

A debtor must appoint a registered debt agreement administrator (DAA) or registered trustee to administer the Debt Agreement. The introduction of the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* tightened the regulation of Debt Agreements. The amendments improved industry standards by imposing duties on DAAs, including registration requirements and introducing penalties for wrongdoing on the part of DAAs. Importantly, s 185LA of the Bankruptcy Act provides that a DAA 'has a duty not to be reimbursed for expenses the administrator incurred in administering the debt agreement unless those expenses are of a kind specified in the relevant debt agreement proposal'. The general duties of the DAA include to:

- deal with the debtor's property in the manner provided for in the Debt Agreement;
- provide information to the debtor about the administration of the Debt Agreement if a reasonable request is made;
- provide information to creditors who are party to the Debt Agreement if they make a reasonable request;
- consider whether the debtor has committed an offence against the Bankruptcy Act; and
- refer to the Inspector-General or to law enforcement authorities any evidence of an offence by the debtor against the Bankruptcy Act.

Before a Debt Agreement Proposal can be put forward, the DAA has a duty to make reasonable enquiries about the debtor's financial situation and take reasonable steps to verify the debtor's financial situation (s 185LG).

DAAs must maintain a separate bank account to the debtor and are required to only pay into that account money received from debtors under a Debt Agreement (s 185LD). A DAA must not pay any money out of the account unless it is for the purpose of administering the Debt Agreement, pursuant to a Court order, or otherwise in accordance with the Bankruptcy Act. It is a strict liability offence if any of these requirements are not met (s 185LDA).

DAAs are also required to ensure that creditors party to the Debt Agreement are notified in writing if the debtor is in default of their agreement by 3 months (s 185LB) and notify the Official Receiver if a debtor defaults on their agreement for 6 months (s 185LC).

The *Bankruptcy (Registration and Cancellation of Registration of a Debt Agreement Administrator) Guidelines* 2020 provide that a DAAs who is entitled to remuneration must express their remuneration as a percentage of the total amount payable by a debtor in respect of provable debts. Any remuneration must be taken proportionately over the duration of the agreement.

Example

Debtor owed a total of $30,000 in unsecured debts. She also had a secured car loan of about $40,000. Her Debt Agreement Proposal prepared by a *DAA* was as follows:

- She ceases paying all debts except the secured car loan.
- For the secured car loan, she would pay $28,000 of the total $40,000 debt, over a 3 year period.
- The DAA's remuneration for administering the agreement is 35% of her provable debts, to be paid in monthly instalments over the duration of her Debt Agreement.
- The realisation charge payable to the Australian Government is 7% of the DAA's remuneration (outlined above). The DAA will either pay this after the end of each financial year that the Debt Agreement is on foot, or at an earlier time.
- She would then make 36 monthly payments (3 years) of $1,166.67 totalling $42,000.
- This would be distributed as follows:
    - Distributed to creditor
        - $28,000
    - Paid to DAA – fees for administration of the agreement
        - $14,000
    -

Paid to Australian Government (Realisation Charge)

- $980

Total: $42,980

Savings to the debtor (assuming she completes the Debt Agreement) are limited to the interest she would have paid (which could be substantial). The creditors lose all the interest plus $12,000 in capital. The DAA gains $14,000 less the costs of administering the agreement.

Fees

As shown in the example above, fees paid for both setting up and then administering a Debt Agreement can be substantial. There is also a lot of confusion, with debtors often misinterpreting their initial payments on the upfront fee as payments under the agreement, resulting in disappointment if the proposal is rejected as the money is neither refunded nor set off against their debts. Despite being given the paperwork to sign, clients also tend to focus on the size of the repayments and may not fully appreciate the amount being paid to the administrator rather than the creditors until much later (sometimes only when they default and lose the benefit of any amounts paid to the DAA).

The amount of fees paid is not currently regulated. Although consumers can theoretically shop around, in reality it seems to be creditors who constitute the relevant 'market force' for ongoing fees because they can reject a proposal on the basis that the fees are too high. Consumers tend to be more passive in the process – only concerned initially about the amount of the repayments and whether the agreement is accepted (to stop any enforcement activity by creditors).

Duration

There are now maximum durations for debt agreements. If the debtor has a principal place of residence (they are not agreeing to sell as part of the agreement), the proposal may provide for a maximum of 5 years. A debtor who does not have an interest in a principal place of residence may lodge a proposal for a maximum of 3 years.

The role of financial counsellors

The information in this toolkit is provided to enable financial counsellors to properly advise clients who may be considering a Debt Agreement or who are having problems with a Debt Agreement they have already entered.

Financial counsellors are no longer permitted to set up Debt Agreements.

Important Note: If your client has just signed up for a Debt Agreement and is having second thoughts (or you think they should be) there is a very limited time to stop the proposal from proceeding. Getting out of a Debt Agreement once it has been made is very difficult and undoing the harm is virtually impossible. You need to act immediately to stop the proposal before it is accepted – see **Chapter 11**.

If your client is convinced that a Debt Agreement is the right option for them (once all the consequences have been explained), suggest they get you to do a reality check on affordability before the proposal is submitted.

Conditions on who can enter a Debt Agreement

- There are conditions on the circumstances in which a debtor can propose or enter a Debt Agreement. These are:
- The debtor must be insolvent (s 185C(1));
- Pursuant to s 185C(4) of the Bankruptcy Act, a debtor cannot proceed with a Debt Agreement Proposal if, in the immediately preceding 10 years, the debtor has:
    - been a bankrupt; or
    - been a debtor under a separate Debt Agreement; or
    - given authority for a solicitor or trustee to control their affairs under Part X of the Bankruptcy Act (which is directed to Personal Insolvency Agreements);
- At the time of making the Debt Agreement Proposal, the debtor's unsecured debts cannot total more than the relevant threshold amount, or such amount as may be prescribed by the Regulations (s 185(4)(b));
- The debtor's property divisible among creditors in the event of their bankruptcy cannot exceed the relevant threshold (s 185C(4)(c));
- The debtor's after-tax income cannot not exceed three quarters of the relevant threshold amount (s 185C(4)(d)).

  Note: Where a sequestration order was made against the debtor was subsequently set aside, the debtor is not classed as have been a bankrupt in respect of that sequestration order.

- The debtor's total proposed payments under the Debt Agreement (over the life of the agreement) cannot exceed the debtor's yearly after-tax income by a prescribed percentage (the payment to income ratio) (s 185C(4)(e)).

As at 15 April 2025 the threshold on the maximum value of property to enter into a Debt Agreement is $288,470.00.

> **Note:** The threshold applies to the debtor's ***equity*** in the property, not its total value.

The threshold is an indexed amount available on the Australian Financial Security Authority website

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Further, even if a debtor fails this test, a Debt Agreement Proposal can still be accepted if:

- the administrator is satisfied and provides a signed certificate that the debtor can meet their obligations (s 185C(4C)); or
- the debtor has an interest in the home where they live.

When does the ten years start from?

- Bankruptcy – from the date of discharge/annulment
- Debt Agreements – from the date of completion or if not completed from the date of termination
- Personal Insolvency Agreements – from the date the s.188 Authority was signed

As at 15 September 2025 the allowable limit on unsecured debts was $144,235.00 and on divisible assets was $288,470.00. The maximum income of the debtor was $108,176.25. To get the most up-to- date threshold amount go to the Indexed Amounts section of the AFSA website.

The debtor's after-tax income is their anticipated income after tax and deduction of the Medicare levy for the year commencing on the proposal date.

If the client has a secured debt but the debt exceeds the value of the security, then the amount of the excess is considered an unsecured debt and should be included in the calculation to determine whether the client's unsecured debts exceed the relevant threshold.

Insolvency

Section 185C(1) of the Bankruptcy Act provides that the debtor must be insolvent to propose a Debt Agreement.

The Official Receiver's Practice Statement states that a Debt Agreement Proposal will NOT be accepted where there is insufficient evidence in the Explanatory Statement and Statement of Affairs to support the debtor's statement of insolvency, that is, they are unable to pay their debts as and when they fall due.

The Official Receiver is to have particular regard to the following in the Explanatory Statement and Statement of Affairs to determine whether these factors support a finding of insolvency:

- The circumstances that led to the debtor becoming unable to pay their debts (e.g. loss of employment);
- The status of the unsecured debts (e.g. arrears, repossession, judgment);

- The status of the secured creditors (e.g. arrears, legal action); and
- The date the debtor was last able to pay their debts as they fell due shown by the debtor on the Statement of Affairs.
- Whether the debtor's income is sufficient to pay his or her debts.

Further information about Debt Agreements can be found in the Official Receiver Practice Statement 11 – Debt Agreements on the AFSA website.

According to the Practice Statement above, the Official Receiver may seek clarification from the debtor or the DAA with respect to certain factors that may indicate solvency of the debtor. This includes the circumstances that led to the debtor becoming unable to pay their debts (for example loss of employment), the status of unsecured and/or secured debts, the date the debtor was last able to pay their debts as and when they fell due and whether the income is sufficient to pay the debts.

It has been noted by consumer advocates, however, that there often appears to be little scrutiny of whether or not the debtor is insolvent. Statements by the debtor about their insolvency are often dictated by DAA's 'to ensure it gets accepted'. Further, arrears are sometimes the result of the DAA telling the debtor to cease paying their debts at the first appointment or phone call.

Summary – eligibility for a Debt Agreement as at April 2025

- Insolvent
- No bankruptcy, PIA or other DA in the previous 10 years
- Unsecured debts less than or equal to $144,235.00
- Divisible property less than or equal to $288,470.00
- Taxable income less than or equal to $108,176.25
- All debts must be paid in equal proportion

To get the most up-to- date threshold amount go to the Indexed Amounts section of the AFSA website.

Consequences of proposing and entering a Debt Agreement

Proposing and entering a Debt Agreement has both positive and negative consequences:

Positive

- Debts and enforcement action are frozen while the proposal is considered.

- The debtor may pay less than the full amount owed and may not have to pay any more interest.
- The debtor is released from the same debts as would be the case in bankruptcy upon completion of the Debt Agreement.
- The debtor may retain any assets, such as their home.
- The debtor can remain or become a Director of a company.
- The debtor is not disqualified from being employed in a position defined as key personnel under the *Aged Care Act 1997* – this includes people in charge of nursing staff.

  Note: There may be other forms of employment that will differentiate between a *Debt Agreement* and bankruptcy, but many don't so the debtor will have to make detailed enquiries.

- The debtor may derive some satisfaction from having met a proportion of their financial obligations rather than none.
- The debtor gets to make a single periodic payment rather than keep track of numerous creditors and accounts.

  Important: It should be noted that in some cases, all of the above can be achieved by an informal arrangement with creditors, without the negative consequences listed below.

Negative

- The Debt Agreement Proposal will be recorded on the National Personal Insolvency Index (NPII) – note that it is the proposal that is recorded, and this occurs whether or not the proposal is accepted.
- Even if the Debt Agreement is not accepted by the creditors, the debtor by submitting their proposal has committed an 'act of bankruptcy' which one of their creditors could use to base a Creditor's Petition on and apply to have the debtor made bankrupt by the Court.
- The acceptance or rejection of the proposal will also be recorded on the NPII and any subsequent variation or termination of the Debt Agreement.
- These details will be recorded on the debtor's credit reporting records making it harder for the debtor to obtain credit in the future.
- The debtor is required to disclose that they are subject to a Debt Agreement when they apply for a loan or credit (including a hire purchase agreement or lease) for an amount in excess of **$7,060 (as at 15 April 2025).**
- The debtor will most commonly have to pay both up front and ongoing fees to the DAA.
- The Debt Agreement may last longer than bankruptcy.
- There is a significant risk of non-completion – if the debtor is unable to pay out the agreement in full, the whole amount originally owing will become payable again (with

interest) less the amounts received from the Debt Agreement, and collection/enforcement activity will recommence. The debtor may then have to consider bankruptcy after all at the point of default, which could be several years down the track. Any amounts paid for the preparation and administration of the Debt Agreement will not be refunded.

- There may be ramifications for their employment – check with the appropriate professional body or licensing authority.

The time period for which a Debt Agreement can be retained on an individual's credit file is the longer of the following:

- 5 years from date of agreement; or
- 2 years from when the agreement is terminated or declared void; or
- If the agreement is completed (after longer than 5 years) the date of completion.

It will also mean that Debt Agreement proposals which are withdrawn, voted down, lapsed or rejected by the Official Receiver (even if initially accepted) cannot be retained on a credit file once one of these things has occurred.

> **Note:** Completed Debt Agreements only appear on the NPII until the later of 5 years from the date of agreement or the date of completion. Terminated Debt Agreements only appear until the later of 5 years from the date of agreement, or 2 years from the date of termination. In addition, Debt Agreement proposals will now only appear on the NPII for 1 year from the day that the proposal was either withdrawn, rejected, cancelled or lapsed.

Comparing Debt Agreements with Bankruptcy

There are some benefits that apply to both bankruptcy and Debt Agreements – and these are listed first. Some benefits only apply to one or other arrangement. There are also consequences that cannot be assessed without considering the particular situation. For example, without knowing the amount of payments under a particular Debt Agreement, and the contributions that would be assessed in bankruptcy for that particular person, you can't tell whether a person would be better off financially with one or the other. A financial counsellor can, however, make this assessment in a particular case.

Benefits of both Bankruptcy and Debt Agreements

1. Any debt collection or harassment by unsecured creditors should stop.
2. Bankruptcy or a debt agreement usually will not affect a person's ability to earn an income from their chosen occupation (there are exceptions).
3. Most debts are forgiven at the end of the bankruptcy – the person gets, more or less, a fresh start. Most debts are also forgiven for the debt agreement BUT only if they succeed in completing the agreement.

4. Essential household goods can be retained.
5. A motor vehicle can be retained (any vehicle for a debt agreement; only up to a prescribed value for a bankruptcy).
6. There is generally no criminal sanction (unless the borrower breaches an obligation or acts dishonestly).

Additional benefits for Bankruptcy

1. The bankrupt can usually stop paying most debts immediately.
2. Bankruptcy usually ends after 3 years.
3. There may be a great sense of relief or a reduction in stress.
4. The bankrupt may have more income available for living expenses once relieved of the requirement to pay some debts.

Additional benefits for Debt Agreements

1. Assets will not be sold.
2. Assets acquired during the debt agreement will not be affected by the agreement. However, a material improvement in the debtor's financial position during the debt agreement may prompt a creditor to apply to terminate or vary the debt agreement.
3. A person in a debt agreement can continue as a company director.
4. There are no restrictions on travel for debt agreements, although payments must be met.
5. Financial affairs are not usually investigated.

Consequences that may make a Debt Agreement better than bankruptcy – this will depend on the circumstances:

1. Income is not taken **BUT** payments must be met – how this will compare to meeting income contributions will depend on the terms of the debt agreement and the certainty of income of the client.
2. There may be some sense of relief for the client, with lower payments and fewer creditors to keep track of. **HOWEVER**, many complaints are made by debtors who are disappointed and feel they have been misled or who are struggling to keep up with payments.
3. Sometimes there is more income available for living expenses, but this will be dependent on how much less the payments are under the agreement compared to the contractual payments, whether or not the debtor could have obtained a hardship variation on similar terms and the general affordability or the agreement in the debtor's circumstances.
4. Some people may feel that it is preferable to make a significant contribution to their debts via a debt agreement rather than go bankrupt. **HOWEVER**, as a result of NPII and credit report listings, treatment by others is often the same as bankruptcy.

Negative Consequences of both Bankruptcy and Debt Agreements

1. Some debts will not be extinguished in bankruptcy. Debtor will not be released from those debts that are not released by bankruptcy even if they complete the Debt Agreement.
2. A record of the bankruptcy is retained in the public register forever (NPII). A record of the Debt Agreement (and proposal even if it does not proceed) is retained on a public register forever (NPII). **NB: note about potential change to this.**
3. A record of the bankruptcy remains with credit reference agencies for the longer of 5 years from the start, or 2 years from discharge. A record of the Debt Agreement remains on the debtor's credit report for the longer of 5 years from the start, or 2 years from termination or being declared void. If completed after 5 years, then until completion

A bankrupt and a debtor in a Debt Agreement may be prevented from working in some roles or professions or need to seek special permission or show cause to do so. However, this would occur in less cases for a debtor in a Debt Agreement than for bankruptcy (for example, The *Aged Care Act 1997* excludes bankrupts from being key personnel in certain facilities by does not mention debtors in Debt Agreements).

Negative Consequences of Debt Agreement only

1. There is no limit to how long a Debt Agreement may be and the evidence from the most recent review shows that many now exceed 5 years in length.

Negative Consequences of Bankruptcy only

1. Non-protected assets, including a home, may be sold.

2. 50% of income above the prescribed amount is payable to the trustee.
3. Certain assets acquired during the bankruptcy can be taken and sold for the benefit of the creditors.

Questions to decide if my client benefit from a Debt Agreement?

Step 1: Can your client meet their debt repayments as they fall due?

- ○ **YES: Then neither a DA nor bankruptcy is an appropriate option**
- ○ **NO: Go to Step 2**

Step 2: Has your client, or someone acting on their behalf, tried to negotiate informal arrangements with the client's creditors, such as a hardship variation, reduced lump sum payment or compassionate release (if appropriate)?

- ○ **NO: Go to Step 3**
- ○ **YES: Successful agreements reached, DA is not necessary**
- ○ **YES: Unsuccessful negotiations: Go to Step 4**

Step 3: A DA is a formal arrangement under the Bankruptcy Act with serious consequences. Attempts should always be made to come to informal arrangements with creditors first.

- **[Back to Step 2 – try negotiations]**

Step 4: Have negotiations for informal arrangements been unsuccessful?

- ○ **YES:** Does your client have any assets that would not be protected in bankruptcy (such as a home in which they live)?
  - ▪ **YES: Go to Step 5**
  - ▪ **NO: Go to Step 6**

Step 5: Is your client's equity in those assets (market value less any loan/mortgage secured over the asset) MORE than the threshold amount (AFSA website lists up to date threshold amounts)?

- ○ **YES: Your client is not eligible to enter a DA**
- ○ **NO:** Your client may be a candidate for a DA but make sure they fully understand the consequences before referral. If your client has a mortgaged home they wish to continue paying, you should warn the client that failure to meet both the mortgage repayments or payments under the DA could result in repossession of the home or bankruptcy (and likely loss of the home anyway) in the future. If your client's creditors are not pressuring them for payment, they may be better off just waiting to see if circumstances improve. If one or more creditors have judgment or have issued a Bankruptcy Notice, then the client will need to act quickly. See also **Chapter 6, Part 3, Bankruptcy and Mortgages.**

Step 6: Is your client a director of a company or intending to be a director of a company in the next 3-5 years?

- **NO: There is no good reason for your client to consider a DA.** Your client should either enter informal arrangements with as many creditors as possible, consider bankruptcy, pay as much as they can afford, or do nothing. You should advise them of the consequences of doing nothing.
- **YES:**

    1. Does your client owe unsecured creditors more than the threshold amount (AFSA website lists up to date threshold amounts)? OR
    2. Is your client likely to earn more than the threshold amount in the next 12 months? OR
    3. Has your client done any of the following in the last 10 years:

        - Been bankrupt (unless it was annulled), or
        - Entered a DA, or
        - Appointed a controlling solicitor or trustee under Part X of the Bankruptcy Act?
            - **YES, to any of the above:**
            - **Your client is not eligible to enter a Debt Agreement.**

    4. Does your client have assets that could be sold to pay their debts in full?

        - **YES:** Your client should seriously consider selling their assets to pay their debts rather than taking insolvency action and all its consequences, unless creditors have already commenced insolvency proceedings and no compromise can be made.
        - **NO:** A Debt Agreement may be the appropriate option for your client, but the consequences of this choice should be articulated, see **Chapter 11** for more details.

In short, a Debt Agreement is unlikely to be suitable to your client unless they have assets to protect and/or they wish to be, or continue to be, a company director (or other occupation where this is permitted under a Debt Agreement but not bankruptcy). The circumstances where a client both fits one of these categories and meets all the legal requirements for eligibility are relatively rare. Further, the risk of non-completion of the agreement is very real, usually leaving the debtor worse off than if they had never made the agreement in the first place.

Tip: Your client should NOT enter a Debt Agreement where he or she:

- Would not be likely to have to pay contributions in bankruptcy

- Does not have any assets that would be taken by the Trustee and
- Is not a company director (and does not want to be)

Bankruptcy is likely to be a better option.

Finally, if your client is contemplating a Debt Agreement, they should be warned to make sure the Debt Agreement is affordable and likely to be completed within a reasonable period of time. Accordingly, when preparing their budget they should include contingencies. As a general rule clients should be wary of any Debt Agreement Proposal that will last significantly longer than the usual period of bankruptcy (3 years).

Using a Debt Agreement to save the home

If the client is trying to protect their equity in a home, then extra care needs to be taken in making the decision to enter into a Debt Agreement. Importantly, the client needs to be confident of being able to pay both the periodic payments due under the Debt Agreement and the mortgage in the coming years.

You should advise your client to do a detailed analysis of their options, including comparing what they would have to pay under a Debt Agreement in addition to their mortgage, compared to option of selling the home, renting a home suitable to their needs and either going bankrupt or attempting to pay the remainder of the debts after applying any equity in their home towards those debts. You should also try to assist them to imagine their likely position in 3 years and 5 years time under each option.

While losing any hope of capital gain on their home (if they sell) and the problems associated with getting back into the housing market after leaving it are valid considerations, they are only valid to the extent that retaining the home is at all realistic. Such considerations should also be carefully balanced against other important factors, such as the stress associated with debt repayment and having income available for improvements in lifestyle. Of course, if the debtor would have to pay more to rent a suitable home than the amount of their mortgage payments then the option of staying in the home has clearer benefits.

If your client has no equity in their home at all and the value of the home is not likely to increase much in the next 3 years, then she or he could consider bankruptcy in which case they may be able to keep living in the home whilst maintaining the mortgage/ rates/ insurance payments with a view to ‘buying back’ their equity in the home from the trustee when they are discharged in 3 years. However, this alternative also entails significant risk (see **Chapter 6 Part 3**).

Case study

A husband and wife entered a Debt Agreement in relation to their unsecured debts in an attempt to save their home. Unfortunately, they could not keep up with the repayments under the Debt Agreement and the mortgage, so they put the house on the market. Eighteen months later they still can't afford to live because the repayments under the Debt Agreements and rent alone leave them with only $50 per week! They will need to terminate the agreement and go bankrupt or stop paying and wait until it is terminated automatically.

Very occasionally a client may come along where a Debt Agreement offers real advantages:

Case study

The client is a 55 year old company director with his own business. He is married and the family home is in his wife's name.

He has a number of debts arising from credit cards that total $52,000. He has a judgment debt of$36,000 resulting from an action taken against him by the purchaser of a previous business for poaching his old clients in breach of contract. He had been to mediation but had failed to meet the agreed repayment schedule.

The judgment creditor served a *Bankruptcy Notice* and subsequently served a *Creditor's Petition* on the client. The judgment creditor has indicated that he has no interest in a negotiated arrangement. The client believes the creditor just wants to put him out of business.

There is a *Creditor's Petition* hearing in 3 weeks' time. The client's income is about $60,000 per annum after tax according to a statement from his accountant and his assets are below the threshold for entering a *Debt Agreement.* The new business is currently up for sale but in the meantime, he would like to continue as company director. He believes he will eventually be able to pay his debts either from his income or the proceeds of the sale.

The above client is very likely to end up bankrupt regardless of any action on his part unless he can come up with a lot of money fast. Without more information we cannot tell whether the trustee is able to claim an interest in the family home in bankruptcy, but it is certainly possible depending on the history. The client will also be prevented from a being a company director if he is made bankrupt. The other advantage of a Debt Agreement in this case is that the credit card creditors can potentially bind the reluctant judgment creditor (force him to accept the Debt Agreement) because they hold the majority of the debts by value. If the business was successfully sold, the client could apply to vary the agreement and pay out the debts earlier than anticipated, completing the agreement.

However, it may not be easy to get a Debt Agreement accepted at this late stage in the Creditor's Petition process. The challenges of doing this are covered in **Chapter 10**.

Non-completion risk

Perhaps the biggest risk not taken into account by consumers entering Debt Agreements is the risk of non-completion. Many consumers contact financial counselling services after they have defaulted on a Debt Agreement. This is the real risk that consumers often don't take into account. Once they have defaulted, they have limited options. They can apply to vary the Debt may not be accepted or they may default again. Once a Debt Agreement has been terminated, the consumer owes all the original debts, plus back-dated interest, less any money that was paid to the creditors under the agreement. Any amounts paid to the DAA (or a broker) are lost. The reality for people who cannot meet the repayments under their Debt Agreement is often inevitable bankruptcy after a lot of money and time is wasted.

Client suitable for a debt agreement – next steps

If your client is suitable for a Debt Agreement, then they will need to consult a suitably qualified Debt Agreement Administrator. AFSA can provide referral information, also available on their website.

Further information on what is required to get into a Debt Agreement and what your client can do if they are already in one and want to get out and/or complain is contained in **Chapter 11.** Where your client has been in the process of applying for a Debt Agreement and has now changed his or her mind, urgent action is required to stop the process (if it's not too late already!) – see **Chapter 11.**

See also **Chapter 10** in the event that a Creditor's Petition has been presented against your client and they are considering a Debt Agreement.